United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

ORIGINAL

76-1569

To Be Argued by
CARL D. BERNSTEIN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

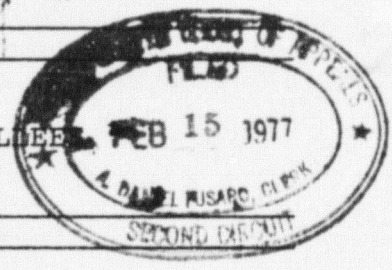
UNITED STATE OF AMERICA,

Appellant,

-against-

HERMAN BANERMAN, VINCENT F. CIOFFI, KENNETH R. LEMANSKI, FRANK P. MENGRONE and JOSEPH SCHNITZER,

Appellees.



BRIEF FOR APPELLEES

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PRELIMINARY STATEMENT

The Appellees, HERMAN BANERMAN, VINCENT F. CIOFFI and FRANK P. MENGRONE, accept the Preliminary Statement, as set forth by the United States Attorney in his Brief, and accept the Statement of Facts, as set forth by the United States Attorney in his said Brief.

ARGUMENT

THE APPELLEES HAVE STANDING TO CONTEST THE SEARCH OF THE NO NAME GARAGE AT 226 39TH STREET, UNDER THE CONSPIRARY COUNT OF THE INDICTMENT.

The Appellant, in his Brief, takes the position that the five (5) Appellees have no standing to contest the search and seizure, because, in essence, the Government claims that they have failed to establish that any privacy right of theirs was injured by illegal entry of the FBI into the building.

The Government claims that the Appellees have no proprietory or possessory interest which is cognizable by the District Court, and that such intrusion, even if illegal, should not redound to the benefit of the Appellees, since no possessory count is now charged. The Government relies upon Brown v. United States, 411 U.S. 223 (1973), and United States v. Galante and Cameriero, a case decided by this Circuit Court on December 14, 1976.

The instant case is clearly distinguishable from both of the above. In Brown and Galante, the defendants were not present at the time of the search, but were, in fact, some distance removed. In Brown, the situs of the illegal search was owned by a gentleman named Knuckles; in Galante, the situs of the search was owned by one Cohen. Here, the Government concedes, as indeed they must, that all seven (7) defendants were present at the time the FBI entered the premises.

The Supreme Court in Brown indicated, that there is a three-prong test that must be considered before deciding whether an individual has no standing to contest the seizure. The Court should consider whether one was on the premises at the time of seizure, or whether one is charged with an offense which includes a possessory element as an essential element of the crime, and whether one has a possessory or proprietary interest in the premises. Here, unlike in Brown and Galante, the Appellees were clearly present. Furthermore, by the Governments's own theory, they were there at the specific invitation of those who had proprietory and possessory interest in the premises: Messrs. Montevecchi and Schneider, and, at the least, had license to be there. In addition, of course, the initial charge included an allegation of unlawful possession. Only now, after the hearing, has the Government moved to sever the possessory count from the indictment in chief.

The Appellees contend that, before the Government can successfully contest the right of any defendant to have

"standing" in motion to suppress, the Government must establish, by a preponderance of evidence, that all three (3) legs of the test, as set forth in Brown and Galante, are met. The Government has failed to do this.

The facts show a relatively small, integrated warehouse, with no clear definition between the first and second floors. The entire premises were under the operation and control of No Name Transportation Company which, the Government admitted, was operated and possessed by Messrs. Montevecchi and Schneider. The Appellees may not meet a common law definition of property or "possession", but they were clearly there as invitees and licensees of those in possession.

Constitutional guarantee should not rise or fall upon narrow definitions of property or possession. It is the contention of the Appellees that they have actual standing.

C O N C L U S I O N

THE ORDER OF THE DISTRICT COURT WHICH DENIED THE RE-HEARING SHOULD BE SUSTAINED.

Dated: New York, New York
February 9, 1977

Respectfully submitted,

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of counsel

STATE OF NEW YORK
COUNTY OF NEW YORK

LAURA TERRACCIANO being duly sworn deposes and says: On February 15th, 1977 I served the within ~~record on appeal~~ brief ~~appendix~~ on Anthony Scholl Esq. the attorney for the ~~respondent~~ appellant by ~~leaving~~ mailing ~~him~~ two copies thereof ~~to~~ at his office located at 225 Cadman Plaza East Brooklyn, New York 11201

Laura Terracciano

Sworn to before me
this 15th day of
February, 1977

Lillian Weisberg

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 1, 1978